Internal Revenue Service

memorandum

CC:TL-N-8848-89
Brl:TDMoffitt

date: SEP 20 1989

to: District Counsel, Houston, CC:HOU

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: [redacted] v. Commissioner, T.C. Docket No. [redacted]

This is in response to your request for tax litigation advice dated July 18, 1989, with regard to the above-referenced case.

ISSUE

Whether the issue of attorney's fees in the above-referenced case should be settled. 7430-0000

CONCLUSION

Based upon the facts as you have described them in this case, we agree that the attorney's fee issue should be settled in favor of the petitioners. The amount of fees allowed should take into account the $75 per hour cap of I.R.C. § 7430(c)(1)(B)(iii).

FACTS

The taxpayer in this case, along with her husband, submitted joint returns for the tax years [redacted] and [redacted] to an IRS revenue officer in connection with the investigation of their tax liabilities for those years. These returns were submitted to the revenue officer on [redacted]. The returns fully reported the Form W-2 wage income of the taxpayers for those years. On [redacted], a statutory notice of deficiency was issued to [redacted] for each of these years asserting unreported Form W-2 wage income. The notices of deficiency also asserted unreported interest income totalling $[redacted]. It is not clear to what extent these interest amounts were in fact reported. A petition was filed in the Tax Court on [redacted], and an answer filed on [redacted]. The district counsel office assigned to the case informed the petitioner's counsel that the case would be conceded if it was determined that the allegations in the petition that the income had been reported were true. Upon assignment of the case to appeals this conclusion was reached and the offer to concede the case was made. Petitioner's counsel has refused to sign a decision document until the issue of attorney's fees is settled.

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DISCUSSION

The judicial proceeding in this case was filed after November 10, 1988. As such, the amendments to section 7430 made by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) apply. We agree that as a result of TAMRA the position of the United States is evaluated for substantial justification at the point of the issuance of the statutory notices. Based upon the fact that the petitioner had filed with the revenue officer returns reporting the very income which over six months later the notices of deficiency stated was unreported, we agree that the position of the United States at the time of the issuance of these notices of deficiency was not substantially justified and that the attorney's fee issue should be settled.

It is our understanding from a telephone conversation with William Bissell that the petitioner is seeking attorney's fees in excess of the $75 per hour cap. Absent any "special factors", the hourly rate for the calculation of attorney's fees is limited to $75 per hour unless the court determines that an increase in the cost of living justifies a higher rate. This is supported by Stieha v. Commissioner, 89 T.C. 792 (1987), in which normal billing rates above $75 per hour, limited availability of tax counsel in the Reno, Nevada area, and lack of familiarity of the tax counsel available in Reno, with the area of tax law relevant to the case, were found not to be "special" circumstances justifying an award in excess of $75 per hour. Similarly, in Powell v. Commissioner, 91 T.C. 673 (1988), appeal filed, No. 88-4857 (5th Cir. November 17, 1988), the court's award of litigation costs was limited to $75 per hour.

A discussion of the "special factors" which would justify an award of attorney's fees in excess of the $75 rate under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which discussion we feel is equally applicable to the language of section 7430, is found in Pierce v. Underwood, 108 S.Ct. 2541 (1988). In Pierce, the court read the language establishing the limited availability of qualified attorneys as a "special factor" which might justify an award of attorney's fees at a rate higher than $75 per hour as referring to attorneys having some distinctive knowledge or skill rather than to those with a greater level of general legal knowledge. The examples of patent law or foreign law are given as representing such distinctive knowledge.

It does not appear that any such "special factor" would be present in the instant case justifying an increase in the $75 per hour cap. Note, however, that the Tax Court has recently been receptive to the argument that the $75 per hour cap should be increased due to a rise in the cost of living. Cassuto v. Commissioner, 93 T.C. No. 24 (August 28, 1989).

We disagree with the reasoning of the court's opinion in Cassuto, wherein it found that the $75 per hour cap on attorney's fees should be increased to reflect the increase in the cost of living since the effective date of the original enactment of the EAJA, October 1, 1981. On this issue the court relied on Trichilo v. Sectetary of Health and Human Services, 823 F.2d 702 (2d Cir. 1987). Trichilo, was dealing with the $75 per hour cap under the EAJA. The Fifth Circuit has also adopted the view that under the EAJA cost of living increases should be calculated from October 1, 1981, in Baker v. Bowen, 839 F.2d 1075 (5th Cir. 1988). While we believe that cases interpreting the EAJA have significant application to section 7430, Trichilo, and Baker, are distinguishable from the instant situation in that they interpret the EAJA, which had originally lapsed in 1984, by analyzing its reenactment by Pub. L. No. 99-80. The court states in Trichilo, supra, at 705 that Congress originally intended the EAJA to be a limited experiment, however, when it was reenacted in 1985 it was made permanent and was intended to be reenacted as if it had never lapsed. It is this intent to reenact the EAJA as if it had never lapsed which leads to the conclusion that the $75 per hour cap is to be increased for a rise in the cost of living dating from the effective date of the original EAJA, October 1, 1981.

There is no expressed intent for the enactment of the $75 per hour cap of section 7430 to relate back to the original enactment of the EAJA or earlier versions of section 7430 as there was in the reenactment of the EAJA in 1985. It is ironic that Cassuto, would make cost of living adjustments to the $75 per hour cap of section 7430 for years to which that section has never been applicable. We believe that any increase in the cost of living applicable to the $75 per hour cap of section 7430 would need to be measured from January 1, 1986, the effective date of the provision of the Tax Reform Act of 1986, Pub. L. No. 99-514, Oct. 22, 1986, 100 Stat. 2753, which first included a $75 per hour cap on attorney's fees in section 7430.

Despite its rejection by the Fifth Circuit in Baker, we believe that the rationale of Chipman v. Secretary of Health and Human Services, 781 F.2d 545 (6th Cir. 1986), another case dealing with the EAJA, is persuasive on the issue of cost of living adjustments to the $75 per hour cap on attorney's fees under section 7430. In Chipman, the court refused to increase the $75 hourly rate cap noting both that this amount was a cap, not a floor, and that the EAJA had been reenacted between the time of Chipman, and its original enactment, without an increase by Congress of the $75 per hour cap. While the authority of this argument is lessened in light of the retroactive intent of the reenactment of the EAJA, and thus was not persuasive to the Fifth Circuit in Baker, this emphasis on the reenactment of the EAJA without changing the $75 per hour figure is applicable to the

original enactment of a $75 per hour cap for section 7430 effective January 1, 1986. We believe that this congressional enactment sets the cap applicable to its January 1, 1986 effective date at $75 per hour. Any increase due to a rise in the cost of living should be measured from that point for purposes of section 7430.

Thus, we agree under these facts, that the issue of attorney's fees should be settled in favor of the petitioner. However, we believe that the settlement should be based on an hourly rate which does not exceed $75 unless an increase in this rate is justified by an increase in the cost of living since January 1, 1986.

If you have any questions concerning this matter, please call Thomas Moffitt of this office at FTS 566-3521.

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